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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 IN RE: AMERANTH CASES  
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Lead Case No.: 11-CV-1810-DMS(WVG)

**ORDER ON DISCOVERY DISPUTES  
(STARBUCKS MOBILE PAYMENT)**

**(Parties: Ameranth and Starbucks)**

**[Doc. Nos. 1206, 1207, 1208 & 1209.]**

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18 Ameranth and Defendant Starbucks Corporation disagree about whether the scope  
19 of permissible discovery in this case covers the “Mobile Payment” feature of Starbucks’s  
20 mobile application. They do not dispute that the app’s “Mobile Order & Pay” feature is a  
21 covered accused system, and discovery has proceeded on this feature to this point. The  
22 Court finds this matter suitable for decision on the papers submitted, S.D. Cal. Civ. L. R.  
23 7.1(d)(1), and finds as a threshold matter that the dispute over written discovery is  
24 untimely. The Court finds the dispute over Starbucks’s Rule 30(b)(6) witnesses’ inability  
25 to answer questions about Mobile Payment is timely, but finds Mobile Payment is outside  
26 the scope of Ameranth’s definition of “Accused System” and claims chart.

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1 **A. Brief Background**

2 Starbucks's mobile application presently contains two relevant features—Mobile  
3 Payment and Mobile Order & Pay. Starbucks released Mobile Payment in January 2011.  
4 The app originally contained only Mobile Payment, which permitted customers to pay for  
5 in-store purchases made physically at each coffee house.

6 Starbucks later introduced Mobile Order & Pay in September 2015. This added  
7 feature permits customers to view food and drink menus, place mobile orders, and pay for  
8 orders from remote locations before arriving at the store. Customers using Mobile Order  
9 & Pay need not pay for purchases at the cash register, as payment has been made before  
10 their arrival. Starbucks's app retained Mobile Payment for customers who wished to place  
11 in-person orders the old-fashioned way and pay for purchases at the cash register.

12 Starbucks contends Mobile Payment is a separate system that is not covered by  
13 Ameranth's infringement contentions. Accordingly, Starbucks has produced discovery  
14 only for Mobile Order & Pay and contends discovery throughout this case has focused on  
15 Mobile Order & Pay. Moreover, at the depositions of two Starbucks Rule 30(b)(6)  
16 witnesses, the witnesses were not familiar with or able to discuss Mobile Payment, which  
17 they claimed was a different system they had not worked on. Ameranth contends Mobile  
18 Payment is simply an earlier version of Mobile Order & Pay and contends its infringement  
19 contentions properly accuse Mobile Payment—specifically the portion of its claims chart  
20 related to claim 13 of the '077 patent.

21 **B. The Document Production Dispute is Untimely**

22 As an initial matter, Starbucks contends the written discovery dispute is untimely in  
23 violation of this Court's requirement that discovery disputes be presented to the Court  
24 within 30 days of their arising. Starbucks is correct.

## 1           **1.     Dispute Timeline**

2           For purposes of this Order, the Court credits as true Ameranth's recitation of  
 3 chronological facts. (*See* Doc. No. 1029 at 5-6.)<sup>1</sup> On March 9, 2018, Starbucks produced  
 4 3,604 pages of documents in response to Ameranth's requests for production of documents,  
 5 which were propounded on February 8, 2015. (*Id.* at 5.) Then on March 15, Starbucks  
 6 served responses and objections. (*Id.*) Starbucks produced an additional 3,356 pages of  
 7 documents on May 7 and 31, 2018. (*Id.* at 6.) According to Ameranth, "[a]fter reviewing  
 8 the May 31, 2018 production, it became clear that Starbucks had produced detailed  
 9 financial data concerning orders made and paid for via [Mobile Order & Pay] but had not  
 10 produced financial data concerning pre-[Mobile Order & Pay] mobile payments or non-  
 11 [Mobile Order & Pay] payments." (*Id.*) Ameranth then "promptly raised the issue with  
 12 Starbucks' counsel one week later on June 7, 2018," and Starbucks "responded on June 14,  
 13 2018 declining to produce the requested documents." (*Id.*)

14           Ameranth contends that after "receiving Starbucks' response on June 14, 2018 it  
 15 became apparent that Starbucks was restricting its document production to [Mobile Order  
 16 & Pay]. This was not previously apparent to Ameranth in light of the rolling production  
 17 of documents that Starbucks had been making since March 9, 2018 through May 31, 2018."  
 18 (*Id.*) Starbucks thereafter produced an additional 1,509 pages of documents on June 14,  
 19 19, and 20. (*Id.*)

20           The parties called this Court's chambers regarding this dispute for the first time on  
 21 July 11, 2018.

## 22           **2.     Discussion**

23           This Court's Civil Chambers Rules make clear that for written discovery, "the event  
 24 giving rise to the discovery dispute is the date when the response was actually served or  
 25 when legally due to be served." Civil Chambers R. § IV(f). Here, Ameranth propounded  
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 28 <sup>1</sup> Page references to documents on the docket are to the electronic page numbers created  
 by the CM/ECF system.

1 requests for production of documents on February 8, 2018. Starbucks's responses or  
2 objections were due no later than March 9, 2018, Fed. R. Civ. P. 34(b)(2)(A), which is the  
3 day Starbucks began to produce some responsive documents. Accordingly, the 30-day  
4 deadline to present any disputes expired on April 9, 2018. However, the parties did not  
5 jointly contact the Court to present this dispute until July 11, 2018—more than two full  
6 months after the deadline passed. As a result, the instant dispute is untimely and will not  
7 be considered.

8       The dispute did not arise on the date of the May 31, 2018 document production  
9 because that production was simply a delayed fulfillment of Starbucks's original obligation  
10 to respond to Ameranth's discovery requests on March 9, 2018—the original day that  
11 responses, objections, and documents were due. Given that Starbucks had not fully  
12 complied with its discovery obligations on March 9, the dispute arose at that moment. And  
13 certainly the dispute crystallized on March 15, 2018, when Starbucks served its objections.  
14 It is plain from the Court's Chambers Rules and should have been clear to Ameranth given  
15 its repeated interactions with the Court that it needed to notify the Court on or before April  
16 9—but definitely no later than April 15—in order to preserve the dispute.<sup>2</sup> At the very  
17 least, the parties should have sought an extension of the deadline.

18       The Court's dispute deadline also does not begin to run on the date documents are  
19 produced. Were the Court to allow this, it would both create unnecessary complexities and  
20 render the Court's 30-day deadline meaningless. Indeed, the ongoing, rolling production  
21 of documents that occurred here elucidates that point. Starbucks produced documents on  
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24 <sup>2</sup> In any event, this dispute would have been untimely even if the Court gave Ameranth the  
25 benefit of the doubt and calculated the deadline from the May 31, 2018 substantive  
26 document production date when "it became clear that Starbucks" had not produced any  
27 pre-Mobile Order & Pay financial data. (*See* Doc. No. 1209 at 4.) Based on that date, the  
28 deadline was July 2, 2018 (given that 30 days fell on a Saturday), but the parties did not  
jointly call chambers until July 11, 2018 and did not seek extension of the hypothetical July  
2 deadline.

1 *five* separate occasions after its initial March 9 response. So when would have the 30 day  
2 clock started to run if not on March 9? Would it have run from the date of the first  
3 production of documents? From the last production? Would there have been a separate  
4 30-day clock for each of the six document productions? The Court’s clear rule in its  
5 Chambers Rules dispenses with these ambiguities and complexities. The deadline begins  
6 to run on the day the response is served or legally due. Here Starbucks’s (albeit deficient)  
7 responses were first served and due on March 9 and then objections followed on March 15.  
8 Tying the deadline to dates of rolling document productions would effectively extend the  
9 deadline well beyond what the Court’s rule permits—a crafty litigant could continue to  
10 produce documents and reset the 30-day deadline, rendering it no deadline at all and thus  
11 meaningless.

12 Finally, Ameranth appears to believe that the 30-day deadline did not begin to run  
13 until the parties’ June 14, 2018 meet-and-confer, when it apparently became clear that  
14 Starbucks was not going to produce Mobile Payment-related discovery. As an initial  
15 matter, that fact should have been clear to Ameranth as of May 31, 2018 after Ameranth  
16 reviewed that document production and found Starbucks “had not produced financial data  
17 concerning pre-[Mobile Order & Pay] mobile payments or non-[Mobile Order & Pay]  
18 payments.”<sup>3</sup> (Doc. No. 1209 at 4.) In any event, meet-and-confer dates do not trigger the  
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21 <sup>3</sup> This explanation seems to lack full credibility given Starbucks’s representation that it has  
22 never produced discovery related to Mobile Payment nor had discussions about that feature  
23 since Ameranth served its third set of supplemental infringement contentions on August 7,  
24 2017. (*See* McKeever Decl., Doc. No. 1206.) Because Starbucks had not produced Mobile  
25 Payment documents on March 9 and did not produce them on May 31, Ameranth knew  
26 before the meet-and-confer that it lacked older documents and information that could relate  
27 to Mobile Payment. Indeed, Starbucks’s objections to Ameranth’s RFPs’ definition of  
28 “Starbucks Accused System” on March 15, 2018 put Ameranth on notice that the responses  
were limited only to the Mobile Order & Pay feature. (Doc. No. 1206-7 (“Starbucks, to  
the best it can understand Ameranth’s Infringement Contentions, interprets the Mobile  
Order & Pay (“MOP”) Program as the Accused System and applies that understanding to  
each response.”).) Ameranth was thus expressly on notice as of March 15 that Starbucks’s

1 running of the 30-day deadline. Were this the case, a party could wait until the 29th day  
2 after a deficient discovery response to meet-and-confer and thereby extend the dispute  
3 another 30 days. The Court's Chambers Rules clearly do not provide for—nor would the  
4 Court endorse—such a result.

5 The parties in this case are fully aware of this Court's discovery dispute process, and  
6 Ameranth in particular has been a participant in multiple discovery conferences with other  
7 defendants in this case. As a result, Ameranth is fully knowledgeable of the Court's  
8 adherence to the 30-day deadline as well as the process for extending it. Disputes have  
9 been frequent in this case, and the Court has readily granted extension requests in the past.  
10 (*See, e.g.*, Doc. Nos. 930, 932, 945, 948, 968, 998, 1010, 1013 & 1023.) Indeed, Ameranth  
11 and Starbucks have followed proper procedure and were granted an extension to bring  
12 disputes related to analytics discovery to the Court's attention before May 11, 2018. (Doc.  
13 Nos. 1020, 1023.) Ameranth easily could have timely moved—as it has on multiple other  
14 occasions—to extend the dispute deadline related to Starbucks's deficient responses. For  
15 whatever reason, it did not do so and failed to comply with procedures that should be crystal  
16 clear to Ameranth by now. Accordingly, this dispute will not be considered and the status  
17 quo related to Starbucks's document production—or lack thereof—for the Mobile Payment  
18 feature will be maintained.

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23 responses did not include Mobile Payment. However, it did nothing to timely disabuse  
24 Starbucks of its “incorrect” interpretation or seek timely Court intervention. Finally,  
25 Ameranth's submission of press releases for the two different systems demonstrates it was  
26 aware there were two systems (both systems currently operate on Starbucks's app and one  
27 did not replace the other), with different functions (*e.g.*, Mobile Payment had no ordering  
28 or menu capabilities), and with different names. (*See* Exs. A & B to West Decl., Doc. No.  
1209-3 & 1209-4.) Ameranth should have been aware long before the instant dispute that  
none of the discovery and discussions with Starbucks encompassed the Mobile Payment-  
relevant time period or mention Mobile Payment.

**B. Ameranth's Infringement Contentions Do Not Accuse Mobile Payment**

The foregoing notwithstanding, there remains a dispute over Starbucks's Rule 30(b)(6) witnesses not being able to answer questions about Mobile Payment. During at least two depositions on June 28 and 29 of this year, two Starbucks witnesses were not able to answer questions, contending that Mobile Payment was a separate system with which they were not familiar. They were familiar only with Mobile Order & Pay. Ameranth requests that Starbucks make available Rule 30(b)(6) witnesses who can testify about pre- and non-Mobile Order & Pay functionalities. This dispute is timely given that the parties called chambers on July 11.

Ameranth contends its amended infringement contentions for the '077 patent dated August 7, 2017 properly accuse Mobile Payment because the "Accused System" is defined broadly to include "all previous 'versions' (from May 27, 2012 to present, and regardless of whether alleged by defendant to be revisions, different version, or different systems . . . ." However, the critical word that repeatedly narrows Ameranth's definition is "ordering." This core word repeatedly appears in connection with Ameranth's definition of the "Accused System," which Ameranth identifies in the alternative as the "Starbucks *Ordering* System." (Doc. No. 1209-5 at 4 (emphasis added); *see also* Doc. No. 1209-5 at 10 (claims chart repeating definitions).)<sup>4</sup> The key word, "ordering," modifies and

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<sup>4</sup> Ameranth's entire claims chart is replete with references to the "ordering" system, and the specific section for claim 13 repeatedly references "ordering." Moreover, as circumstantial evidence for claim 13's "master database" claim element, Ameranth cites the "Starbucks Personalization Engine, which among other things allows consumers to *order* Starbucks products . . . ." (Doc. No. 1209-5 at 131 (Claim 13(a) of claims chart; emphasis added).) Ameranth elsewhere claims that "usage and testing of the Accused System's mobile apps and website evidences the master database since a master database is necessary to synchronize information (such as *menu information*) and functionality (such as *ordering functionality*) . . . ." (*Id.* at 132 (emphasis added).) These references clearly do not accuse Mobile Payment, which has no menu information or ordering functionality for a master database to synchronize. And more still: "The Accused System enables consumers to *order via wireless handheld computing devices* on which Starbucks causes



1 constrains the scope of “system/product/service.” As a result, when Ameranth attempted  
 2 to broadly define the Accused System to include all revisions, versions, and different  
 3 systems, it broadened the definition only in relation to “the Starbucks *ordering*  
 4 system/product/service . . . .” (*id.* (emphasis added)), not Starbucks’s separate, stand-alone  
 5 payment processing system. Mobile Payment has no ordering functionality or capability.  
 6 Thus even though Mobile Payment predated Mobile Order & Pay, it cannot be said to be a  
 7 different version or revision of Starbucks’s *ordering* system, which was a wholly new  
 8 function of the mobile app that did not exist until Starbucks introduced Mobile Order &  
 9 Pay in 2015.<sup>5</sup>

10 The issue with Ameranth’s position is the lack of specificity with respect to  
 11 identification of Mobile Payments in its infringement contentions. The Patent Local Rules  
 12 were designed to streamline discovery and “require parties to crystallize their theories early  
 13 in the case to prevent the shifting sands approach to claim construction.” *O2 Micro Int’l,*  
 14 *Ltd. v. Monolithic Power Sys.*, 467 F.3d 1355, 1364 (Fed. Cir. 2006) (internal quotations  
 15 and citation omitted). Patent Local Rule 3 accordingly requires Ameranth to “be as *specific*  
 16 as possible” when identifying the accused system and requires its identification by name,  
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 20 hospitality application information to be displayed.” (*Id.* at 140 (Claim 13(b); emphasis  
 21 added).) This certainly does not accuse Mobile Payment, which does not allow consumers  
 22 to do any such thing. These are just a few examples of the myriad references to ordering  
 23 and menu display within the claims chart as a whole and in the portion that specifically  
 24 addresses claim 13.

25 <sup>5</sup> Nor does Ameranth’s reference to prior versions since 2012 save the day. Since “the  
 26 Starbucks ordering system/product/service”—i.e., Mobile Order & Pay—did not exist in  
 27 the years between 2012 and 2015, there are no prior versions of this specifically-defined  
 28 system to which this reference could apply. As discussed, *infra*, Mobile Payment is a  
 payment system, not an ordering system. Thus, Ameranth referencing years prior to 2015  
 does not sweep separate systems that do not fit Ameranth’s own definition into this case  
 when Ameranth failed to name those systems in accordance with the Patent Local Rules.



1 if known.<sup>6</sup> S.D. Cal. Patent L.R. 3(1)(b) (emphasis added). “The burden is therefore on  
2 the plaintiff to make a good faith pre-suit investigation to identify all infringing products  
3 and list them as specifically as possible.” *SPH Am., LLC v. Huawei Techs., Co.*, No.  
4 13CV2323-CAB(KSC), 2016 U.S. Dist. LEXIS 119345, at \*7 (S.D. Cal. July 5, 2016). In  
5 the end, words have meaning. That is especially the case in patent litigation where parties  
6 spend considerable effort and resources litigating precise meanings of specific words and  
7 phrases. Specificity is paramount and lack thereof may potentially be fatal. While it may  
8 be tempting to broadly define a claim or infringement contention in order to capture as  
9 many accused systems as possible, it also poses a risk when specificity is lacking. Here,  
10 Ameranth attempted to broadly define Starbucks’s accused system, but failed to follow  
11 through or recognize earlier in this litigation that it self-limited the scope of its case against  
12 Starbucks to the Mobile Order & Pay system that came into existence in 2015. Prior to  
13 2015, Starbucks simply had no previous version of any “ordering system/product/service”  
14 accused in Ameranth’s infringement contentions. Though Ameranth knew about Mobile  
15 Payment, it did not identify it as an accused product, choosing instead to identify only  
16 Mobile Oder & Pay. *See Meidatek, Inc. v. Freescale Semiconductor, Inc.*, No. 11-5341-  
17 YGR(JSC), 2013 U.S. Dist. LEXIS 19568, at \*3-5, \*10-11 (N.D. Cal. Feb. 13, 2013)  
18 (denying motion to compel discovery into products that were not specifically identified as  
19 accused products under similar local patent rule and when products names were  
20 ascertainable through publicly-available sources.). Permitting discovery into Mobile  
21 Payment now would pose precisely the shifting sands approach to claim construction that  
22 the Patent Local Rules seek to prevent.

23 Finally, Ameranth’s inclusion of “different systems” in its definition does not bring  
24 Mobile Payment into Ameranth’s definition. Again, “ordering” modifies and constrains  
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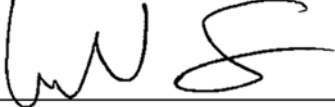
26  
27 <sup>6</sup> Exhibits A and B to Ameranth’s counsel’s declaration demonstrate Ameranth knew  
28 Mobile Payment’s name. *See, supra*, n.3. However, Ameranth identified only Mobile  
Order & Pay in its infringement contentions.

1 the scope of “different systems.” Thus, while there can be more than one system that comes  
2 within this definition, they must as an initial matter be *ordering* systems. A different  
3 system that is not an ordering system does not come within Ameranth’s definition. Mobile  
4 Payment is, to be sure, a different system, but it is purely a *payment* system that lacks any  
5 *ordering* functionality. It is in no way an “ordering” system. Thus, Ameranth’s definition  
6 does not cover Mobile Payment.

7 The Court finds Mobile Payment falls outside the scope of Ameranth’s Accused  
8 System definition and accordingly denies Ameranth’s request for further discovery or to  
9 compel Starbucks to produce for deposition a Rule 30(b)(6) witness who is knowledgeable  
10 about Mobile Payment.

11 IT IS SO ORDERED.

12 DATED: August 9, 2018

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16 Hon. William V. Gallo  
17 United States Magistrate Judge  
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